

INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petition: 89-029-15-1-4-00816-16
Petitioner: Cummings Properties LLC
Respondent: Wayne County Assessor
Parcel: 89-16-35-440-206.000-030
Assessment Year: 2015

The Indiana Board of Tax Review (Board) issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner initiated a 2015 assessment appeal with the Wayne County Assessor on September 8, 2015.
2. On March 4, 2016, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued its determination lowering the assessment, but not to the level requested by the Petitioner.
3. The Petitioner timely filed a Petition for Review of Assessment (Form 131) with the Board, electing the Board's small claims procedures.
4. The Board issued a notice of hearing on November 3, 2016.
5. Administrative Law Judge (ALJ) Joseph Stanford held the Board's administrative hearing on December 12, 2016. He did not inspect the property.
6. Certified tax representative Richard Werner appeared for the Petitioner and was sworn as a witness. Attorney Brian Cusimano appeared for the Respondent. Wayne Township Assessor Timothy G. Smith and Bradley Berkemeier of Nexus Group were sworn as witnesses for the Respondent.¹

Facts

7. The retail property under appeal is located at 4741 National Road East in Richmond.
8. The PTABOA determined a total assessment of \$452,400 (land \$231,500 and improvements \$220,900).

¹ Wayne County Assessor Betty Smith-Henson was present at the hearing but was not sworn as a witness.

9. The Petitioner requested a total assessment of \$265,000 (land \$218,500 and improvements \$46,500).

Record

10. The official record for this matter is made up of the following:

- a) Form 131 with attachments,
- b) A digital recording of the hearing,
- c) Exhibits:

Petitioner Exhibit 1:	Subject property record card,
Petitioner Exhibit 2:	Presentation of valuation approaches for the subject property prepared by Richard Werner (page 11 marked CONFIDENTIAL), ²
Petitioner Exhibit 3:	2015 Commercial/Industrial Land Order,
Petitioner Exhibit 4:	Sales disclosure dated October 13, 2015.
Respondent Exhibit A:	Auction listing for the subject property,
Respondent Exhibit B:	Business Information for Cross Power Ministries, Inc. from Indiana Secretary of State dated December 5, 2016,
Respondent Exhibit C:	Indiana Business Entity Report for New Creations Chapel Incorporated from Indiana Secretary of State dated January 9, 2015,
Respondent Exhibit D:	Letter from Pastor Tim and Bonnie Cummings from New Creations Chapel website dated July 20, 2016,
Respondent Exhibit E:	Newspaper article, "New Creations Closing School," from <i>Richmond-Gannett.com</i> , dated July 25, 2016,
Respondent Exhibit H:	Page 2-64 and 2-65 from <i>Income Approach to Valuation</i> from the International Association of Assessing Officers,
Respondent Exhibit I:	Pages 485 and 486 from <i>The Appraisal of Real Estate</i> ,
Respondent Exhibit J:	Various pages from the Cross Power Ministries' website. ³
Board Exhibit A:	Form 131 with CONFIDENTIAL attachments,
Board Exhibit B:	Notice of hearing dated November 3, 2016,
Board Exhibit C:	Hearing sign-in sheet,
Board Exhibit D:	Notice of Appearance for Brian A. Cusimano.

² While Mr. Werner did not specifically state Petitioner's Exhibit 2 is confidential, it appears to include the subject property's actual income data. Attachments to Board's Exhibit A appear to also include similar data. For these reasons, the Board has marked specific income data as confidential.

³ The Respondent did not introduce Respondent's Exhibits F or G.

- d) These Findings and Conclusions.

Contentions

11. Summary of the Petitioner's case:

- a) The property's 2015 assessment is too high. In an effort to prove this point, the Petitioner offered an analysis prepared by Mr. Werner, the Petitioner's certified tax representative. In his analysis, Mr. Werner developed the cost, sales-comparison, and income capitalization approaches to value. Ultimately, Mr. Werner concluded the best evidence of value was the sale of the subject property for \$265,000 on September 3, 2015. *Werner argument; Pet'r Ex. 2.*
- b) The subject property is a "60,000 square-foot single-tenant retail structure" that "could be called a big box building." At the time of sale, the property was under lease and was utilized as a flea market, but the lessee had stopped paying rent. The property was sold at a public auction and was advertised on "LoopNet and the local and Indianapolis newspapers." While Mr. Werner testified the property sold on September 3, 2015, the sales disclosure appears to indicate a "conveyance date" of September 30, 2015. *Werner testimony; Pet'r Ex. 4.*
- c) Prior to leasing the property, the Petitioner used it for two non-profit organizations, Cross Power Ministries and later New Creations Chapel. While Mr. Werner acknowledged the Petitioner was having "financial difficulties," he claims the Petitioner closed New Creations Chapel and ultimately sold the property because Mr. Cummings and his wife were "ready to hang it up and retire." Mr. Werner contends the sale of the property was "an arm's-length transaction." As to the notion that the Petitioner's motives for selling the property were "atypical," Mr. Werner responded "we don't know whether that's true or not." *Werner argument.*
- d) Turning to the analysis of the subject property, Mr. Werner first developed a cost approach. In valuing the land, Mr. Werner utilized two sales to develop a rate of \$100,000 per acre. However, he only applied 40% of that value to the subject property. Mr. Werner justified this calculation by arguing 60% of the parcel has an "easement allowing usage by the adjoining parcels." Under cross-examination, Mr. Werner acknowledged it may be appropriate to "at least value the other 60% of the parcel at one-third of his \$100,000 per acre rate." *Werner testimony; Pet'r Ex. 2.*
- e) Mr. Werner did not elaborate much on how he valued the improvements under the cost approach, but it appears he computed his value using generally the same methodology as the Respondent. Mr. Werner did apply over 90% depreciation, including functional and external obsolescence. His indicated value under the cost approach was \$265,000, but he stated this approach is not "really applicable for a property that is 46 years old." *Werner testimony; Pet'r Ex. 2.*

- f) Mr. Werner also developed a sales-comparison approach. Because “big box stores” rarely sell, he was forced to examine sales from two years prior. Mr. Werner focused on three sales, one from Fishers, one from Merrillville, and one from Bloomington. He made several adjustments to account for differences such as location, land-to-building ratio, and external walls. Additional adjustments were made for “the difference in depreciation as shown in the DLGF Guidelines.” Finally, he adjusted for differences in grade, pavement, and for items such as mezzanines. His indicated value under this approach was \$250,000. *Werner testimony; Pet’r Ex. 2.*
- g) Finally, Mr. Werner developed an income capitalization approach. He based his computation on “actual rents” and “set the vacancy rate at 12% although rates were closer to 19% for shopping centers in Wayne County.” He computed the replacement reserves by taking “80% of the replacement cost of the building and its economic life.” Additionally, he utilized a management fee of 2%. Finally, a capitalization rate of 13.59% was applied. The indicated value for the property under this approach was \$253,300. *Werner testimony; Pet’r Ex. 2.*

12. Summary of the Respondent’s case:

- a) The property is correctly assessed. Granted, the property sold shortly after the relevant valuation date, but the sale of a property at an auction is not a reliable indicator of the property’s market value-in-use. *Cusimano argument.*
- b) In fact, it appears the Petitioner “was experiencing financial trouble” and had “used up [its] reserves.” Rather than list the property and “wait for the right buyer,” the Petitioner put the property in auction, likely indicating an “atypical motivation” rather than “the actions of a property owner that is trying to get maximum value.” Consequently, the property sold for \$4 per square foot. According to Mr. Berkemeier, a property tax consultant with Nexus Group, “big box stores” generally sell for between \$20 and \$30 per square foot. *Cusimano argument; Berkemeier testimony; Resp’t Ex. D, E.*
- c) Mr. Werner’s value computations are flawed for several reasons. In his cost approach, Mr. Werner failed to apply any value to the “60% of the parcel that he contends is shared parking with two other parcels.” While he computed a rate of \$100,000 per acre via his sales comparison approach, he applied that rate to only 40% of the parcel. However, if he would have applied this rate to the entire parcel, the land value alone would have been in excess of \$600,000. *Cusimano argument (referencing Pet’r Ex. 2).*
- d) In his sales-comparison approach, Mr. Werner utilized purportedly comparable properties that are “all over the map.” Additionally, he made adjustments that “are questionable in terms of their logic and their support.” *Cusimano argument (referencing Pet’r Ex. 2).*

- e) As to Mr. Werner's income capitalization approach, his computation of replacement reserves does not comply with generally accepted appraisal principles. In using the entire building cost, Mr. Werner has included more than only short-lived items such as HVAC and carpeting. Thus, his computation greatly overestimates expenses at over 66% of effective gross income, and therefore underestimates the property's value. Further, according to the auction listing, the potential income is \$23,000 per month; therefore, Mr. Werner "may have" underestimated potential gross income. *Cusimano argument (referencing Pet'r Ex. 2); Berkemeier argument; Resp't Ex. A, H, I.*

Burden of Proof

13. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The burden-shifting statute as amended by P.L. 97-2014 creates two exceptions to that rule.
14. First, Ind. Code § 6-1.1-15-17.2 "applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year." Ind. Code § 6-1.1-15-17.2(a). "Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court." Ind. Code § 6-1.1-15-17.2(b).
15. Second, Ind. Code § 6-1.1-15-17.2(d) "applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1-15." Under those circumstances, "if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct." Ind. Code § 6-1.1-15-17.2(d). This change was effective March 25, 2014, and has application to all appeals pending before the Board.
16. Here, there was no dispute the assessment decreased from \$992,000 in 2014 to \$452,400 in 2015. In fact, the Petitioner's representative admitted the Petitioner has the burden of proof. The burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden remains with the Petitioner.

Analysis

17. The Petitioner failed to make a prima facie case for reducing the 2015 assessment.
- a) Real property is assessed based on its market value-in-use. Ind. Code § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. Assessing officials primarily use the cost approach, but other evidence is permitted to prove an accurate valuation. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles.
 - b) Regardless of the method used, a party must explain how the evidence relates to the relevant valuation date. *O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For a 2015 assessment, the valuation date was March 1, 2015. *See* Ind. Code § 6-1.1-4-4.5(f).
 - c) Here, the Petitioner relied on an “analysis” prepared by its tax representative, Mr. Werner and a recent sale of the property.⁴ In his analysis, Mr. Werner developed three approaches to value: the cost approach, the sales-comparison approach, and the income capitalization approach. His reconciliation of value places “all weight” on the sale of the subject property. Thus, the Board will first examine the details of the sale.
 - d) According to the sales disclosure form and Mr. Werner’s testimony, it appears the subject property sold at auction for \$265,000 on September 30, 2015. A listing for the auction has been made part of the record, but the source and date of the listing is unclear. According to Mr. Werner, the auction was “at some point” advertised on “LoopNet,” in the local Richmond newspaper, and in an Indianapolis newspaper.
 - e) Because the sale of the property occurred a mere seven months after the relevant valuation date of March 1, 2015, the sale price could provide at least some indication of the subject property’s market value-in-use. However, in this case, the sale of the property does not appear to meet the conditions of a market value sale. As explained in the Manual, market value is:

⁴ The Petitioner submitted another “Property Tax Assessment Appeal Report” along with its Form 131. This report was also prepared by Mr. Werner and is dated November 11, 2015. On its face, this report includes similar information as Petitioner’s Exhibit 2. However, upon further inspection the two reports are markedly different. Most importantly, the report attached to the Form 131 specifically states it was prepared in accordance with Uniform Standards of Professional Appraisal Practice (USPAP) and lists Mr. Werner’s accreditation. Petitioner’s Exhibit 2 states neither. The Board will not speculate as to why Mr. Werner did not include this crucial information in Petitioner’s Exhibit 2. Additionally, the reports yield different results upon further examination. As the Petitioner did not introduce into evidence the report attached to the Form 131 nor did Mr. Werner testify to anything in the report, the Board will not place any weight on this report.

[T]he most probable price, as of a specified date, in cash, or terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell *after reasonable exposure in a competitive market under all conditions requisite to a fair sale*, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming *neither is under undue duress*.

MANUAL at 5-6 (emphasis added).

- f) Here, the evidence indicates two key indicia of a market value sale may have been missing. First, no evidence was presented the property was exposed to the market for a reasonable time. The Respondent did offer the auction listing into evidence, but again, that listing is not dated and the listing does not indicate where it appeared or how many people were exposed to it. The same is true regarding the “newspaper advertisements” Mr. Werner mentioned. Second, according to testimony and other evidence, the Board concludes the Petitioner was under financial duress. In fact, the Petitioner posted on its own website, “[w]e have used our financial reserves and can no longer carry on the ministry financially.”
- g) With that being said, an auction sale does not automatically fail to qualify as a reliable indicator of market value-in-use. But, where the preponderance of the evidence indicates that the sale is not reliable, the burden falls back to the Petitioner to provide some evidence the sale is reliable. The Petitioner failed to do so. Mr. Werner acknowledged the Petitioner’s poor financial condition, agreed that it “could have” resulted in atypical motivation to sell the property, and offered only that “we don’t know whether that’s true or not.” Thus, given the circumstances, the weight of the evidence tends to indicate the Petitioner’s selling price by itself is not indicative of market value-in-use. For these reasons, the selling price lacks probative value.
- h) Therefore, the Board will turn to Mr. Werner’s three approaches to value developed in his “analysis.” First, as to Mr. Werner’s cost approach, the Board finds his value conclusion to be unreliable. As Mr. Werner testified, the cost approach has very limited applicability to a 46-year-old property. Regardless, in valuing the land under his cost approach, Mr. Werner placed “no value” on 60% of the parcel because the Petitioner shares that area with two other property owners. Because Mr. Werner admitted this approach has “limited applicability,” and his unsupported rationale for not valuing 60% of the land, the Board finds little probative value in his cost approach analysis.
- i) Next, the Board turns to Mr. Werner’s sales-comparison approach. *See* 2011 REAL PROPERTY ASSESSMENT MANUAL at 9 (incorporated by reference at 50 IAC 2.4-1-2) (stating that the sales-comparison approach relies on “sales of comparable improved properties and adjusts the selling prices to reflect the subject property’s total value.”); *see also, Long*, 821 N.E.2d 466, 469.

- j) To effectively use the sales-comparison approach as evidence in a property tax appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property are not sufficient. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.*
- k) Mr. Werner did little to prove his purportedly comparable properties are actually comparable to the subject property. The properties he selected are all located in other cities and sold for between \$1.2 million and \$5.3 million. His indicated value for the subject property, on the other hand, was only \$250,000. Consequently, his net adjustments range from negative 89% to negative 96%.
- l) The major adjustments Mr. Werner made become even more problematic given the fact that Mr. Werner failed to support his adjustments. True, Mr. Werner attempted to explain them to some extent, but his adjustments inappropriately mix elements of the cost approach and the sales-comparison approach. While his format may not differ significantly from that of a certified appraiser in an appraisal report, the appraiser’s assertions are backed by his education, training, and experience. When an appraiser certifies that he complied with USPAP, we can infer that the appraiser used objective data, where available, to quantify his adjustments. Mr. Werner failed to provide any indication that his report complies with USPAP. Given the failure to adequately support his adjustments, the mixing of approaches, and the lack of USPAP compliance, the Board finds his sales-comparison approach is insufficiently reliable.
- m) Finally, the Board turns to Mr. Werner’s income capitalization approach. This approach contains a major flaw depriving it of probative value. In Mr. Werner’s computation of replacement reserves, he considered the entire building value rather than only the cost of short-lived items. This computation employs a methodology that does not appear to comport with generally accepted appraisal principles. Moreover, it appears to significantly overestimate replacement reserves, and consequently, significantly underestimates the value of the property.
- n) The Board notes that Mr. Werner, while appearing as a witness, was also acting as an advocate. In his capacity as a witness he offered his own “analysis” and arguments regarding that evidence. In his role as an advocate he offered arguments against the Respondent’s evidence. By stepping well outside the bounds of a typical expert witness, Mr. Werner casts doubt on his own independence. Finally, because Mr. Werner acted both as an advocate and as a witness, the Board has serious doubts about his credibility as an independent expert. For these reasons, and the various

issues previously addressed, the Board finds Mr. Werner's opinion unreliable. Consequently, the Petitioner failed to make a prima facie case that the assessment should be reduced.

- o) Where a Petitioner has not supported its claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. LTD v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-22 (Ind. Tax Ct. 2003).

Conclusion

18. The Board finds for the Respondent.

Final Determination

In accordance with these findings and conclusions, the 2015 assessment will not be changed.

ISSUED: May 10, 2017

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days of the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.